



DEPARTMENT OF EDUCATION

34 CFR Chapter II

RIN 1810-AB63

American Rescue Plan Act Emergency Assistance to Non-Public
Schools Program

AGENCY: Office of Elementary and Secondary Education,
Department of Education.

ACTION: Final requirements.

SUMMARY: The U.S. Department of Education (Department)
establishes requirements for the American Rescue Plan
Emergency Assistance to Non-Public Schools (ARP EANS)
program under the American Rescue Plan Act of 2021
(ARP Act). This document is intended to clarify the
requirements applicable to the ARP EANS program, including
the requirement to provide services or assistance to non-
public schools that enroll a significant percentage of
students from low-income families and are most impacted by
the novel Coronavirus Disease 2019 (COVID-19) emergency.

DATES: These final requirements are effective [INSERT DATE
OF PUBLICATION IN THE FEDERAL REGISTER].

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If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Purpose of Program: Section 2002 of the ARP Act, titled "Emergency Assistance to Non-Public Schools," appropriates \$2,750,000,000 for the Department to make allocations to Governors under the ARP EANS program "to provide services or assistance to non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency."¹

Program Authority: ARP Act, Public Law 117-2, March 11, 2021.

Background: The ARP Act extends the EANS program authorized under section 312(d) of division M of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act), with two exceptions: (1) a State educational agency (SEA) may only provide services or assistance under ARP EANS to non-public schools that enroll a significant percentage of students from low-income families and are most impacted by the COVID-19 emergency,

¹Under these final requirements, "students from low-income families" has the same meaning as "low-income students" under section 2002(a) of the ARP Act. "Students from low-income families" is a term used in section 312(d) of division M of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021.

and (2) an SEA may not use ARP EANS funds to provide reimbursements to any non-public school.

Under the ARP EANS program, consistent with section 312(d)(1) of division M of the CRRSA Act, the Department will allot funds by formula to each Governor with an approved application based on the State's relative share of children aged 5 through 17 who are from families at or below 185 percent of the 2020 Federal poverty level and enrolled in non-public schools, as determined by the Department on the basis of non-public school enrollment data from the U.S. Census Bureau's American Community Survey (ACS) Public Use Microdata Sample (PUMS) for 2015-2019, which can be accessed here: <https://www.census.gov/programs-surveys/acs/microdata.html>. The amount available to each State may be found at: <https://oese.ed.gov/offices/education-stabilization-fund/emergency-assistance-non-public-schools/>.

As described in more detail below, the Secretary of Education (Secretary) is establishing final requirements for the ARP EANS program to (1) make clear that, with the exceptions noted above, the requirements of the EANS program authorized under section 312(d) of division M of the CRRSA Act (CRRSA EANS) apply to ARP EANS, and (2) establish guidelines to determine that a non-public school enrolls a significant percentage of students from

low-income families and is most impacted by the COVID-19 emergency.

Prior to issuing these final requirements, the Department invited comment regarding implementation of the requirement “to provide services or assistance to non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency” as part of the *Notice Inviting Applications and Announcing Allocations for the Emergency Assistance to Non-Public Schools Program Under the American Rescue Plan Act of 2021*, issued on April 12, 2021.² The Department received 66 comments, which it reviewed and considered in developing these final requirements.

With respect to the significant poverty percentage, comments generally fell into three groups that advocated for: (1) establishing a specific significant poverty percentage, as high as 75 percent; (2) prioritizing schools in the same manner as under the CRRSA EANS program; or (3) providing a State discretion to determine the significant poverty percentage for non-public schools within the State. Commenters advocating for a specific high poverty percentage did so on the premise that it would ensure that resources are targeted to the most under-resourced communities, which they assert is consistent with congressional intent. Multiple commenters noted that a 75-

² <https://oese.ed.gov/files/2021/04/FINAL-ARP-EANS-notice-4.12.21.pdf>.

percent poverty percentage would align with the definition of a "high-poverty school" used by the National Center for Education Statistics and the threshold for serving public schools in rank order, without regard to grade spans, applicable to within-district allocations under title I, part A (title I) of the Elementary and Secondary Education Act of 1965 (ESEA) (see section 1113(a)(3)(A) of the ESEA). By contrast, other commenters asserted that an excessively rigorous, one-size-fits-all threshold would be inappropriate in the context of non-public schools and their States' specific circumstances and therefore recommended that States be given discretion to determine what constitutes a significant poverty percentage. In support of a more flexible approach, one State provided data indicating that a significant number of non-public schools that applied under CRRSA EANS would be ineligible under ARP EANS even with a poverty percentage as low as 30 percent. Taking these comments into account, the Department sought to establish a specific significant poverty percentage while also recognizing that there are State circumstances that may warrant a different significant poverty percentage in a given State.

In terms of determining the non-public schools most impacted by the COVID-19 emergency, commenters generally noted that the Department's *Frequently Asked Questions: Emergency Assistance to Non-Public Schools (EANS) Program*

as Authorized by the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act) (EANS FAQs)³ provided an appropriate range of factors. The final requirements include a majority of the factors identified in the Department's previously issued EANS FAQs.

GENERAL REQUIREMENTS

Applicability of CRRSA EANS Requirements

Statute: Section 2002(a) of the ARP Act appropriates an additional \$2,750,000,000 for making allocations to Governors under the EANS program to provide services or assistance to non-public schools that enroll a significant percentage of students from low-income families and are most impacted by the COVID-19 emergency. Section 2002(b) further clarifies that the funds provided under section 2002(a) may not be used to provide reimbursements to any non-public school.

Final Requirements: These requirements make clear that all of the provisions of the CRRSA EANS program also apply to the ARP EANS program with two exceptions: (1) an SEA may provide services or assistance under ARP EANS only to an eligible non-public school that enrolls a significant percentage of students from low-income families and is most impacted by the COVID-19 emergency, and (2) an SEA may not use ARP EANS funds to provide reimbursements to a non-public school.

³ <https://oese.ed.gov/files/2021/03/Final-EANS-FAQ-2.0-3.19.21.pdf>.

Reasons: The final requirements clarify for States that, except for the two exceptions noted in the statute, all of the requirements in the CRRSA EANS program apply to ARP EANS funds. Making this clarification ensures that States and non-public schools are aware of all EANS program requirements, including statutory timelines, assurances required in a Governor's application, and other application requirements for both the Governor's and a non-public school's application. The final requirements also clarify the allowable services and activities that an SEA may provide to non-public schools. Significantly, they make clear that, unlike under CRRSA EANS, an SEA may not use ARP EANS funds to provide reimbursements to any non-public school.

DETERMINING NON-PUBLIC SCHOOLS TO BE SERVED

Determining Non-Public Schools That May Receive Services or Assistance

Statute: Under section 2002(a) of the ARP Act, services or assistance to non-public schools under the ARP EANS program are limited to "non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency."

Final Requirements: The final requirements require a Governor, in his or her application for ARP EANS funds, to identify the significant poverty percentage and the factors

of COVID-19 impact the State will use, after approval by the Secretary, to determine which non-public schools are eligible to receive services or assistance. In addition to meeting the definition of a non-public school in section 316(6) of division M of the CRRSA Act and the eligibility requirement in section 312(d)(9) of division M of the CRRSA Act, a non-public school must meet or exceed the State's significant poverty percentage and be most impacted by the COVID-19 emergency.

Reasons: This requirement clarifies those non-public schools that are eligible to receive services or assistance under the ARP EANS program. A non-public school must meet the definition of "non-public school" in section 316(6) of division M of the CRRSA Act and the eligibility requirement in section 312(d)(9) of division M of the CRRSA Act. In addition, the percentage of students from low-income families in the non-public school must meet or exceed either 40 percent or the State's approved alternate significant poverty percentage. Finally, the non-public school must be most impacted by the COVID-19 emergency based on the State's factor(s).

The final requirements reflect nearly all the comments we received. They establish a specific significant poverty percentage that a State may adopt without further explanation, although that percentage is not as high as some commenters recommended for reasons discussed below.

They also afford a State some discretion to propose an alternate significant poverty percentage based on circumstances within the State, as most commenters suggested. The final requirements do not, however, adopt the view of some commenters who suggested implementing ARP EANS in the same manner as CRRSA EANS to reduce burden on SEAs and non-public schools. We believe the ARP Act does not support this suggestion, because it specifically changed the language in the CRRSA Act from "prioritize services or assistance to non-public schools that enroll low-income students and are most impacted by the [COVID-19] emergency" to "provide services or assistance to non-public schools that enroll a significant percentage of low-income students and are most impacted by the [COVID-19] emergency." The ARP Act language differs from the CRRSA Act in two significant respects: (1) rather than establishing a "priority" for serving schools with students from low-income families that then permits other non-public schools to be served, the ARP Act requires a non-public school to enroll a percentage of students from low-income families, and (2) the ARP Act requires that poverty percentage to be "significant." The final requirements reflect this change.

Enrollment of a Significant Percentage of Students from
Low-Income Families

Statute: Under section 2002(a) of the ARP Act, services or assistance to non-public schools under the ARP EANS program is limited to "non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency."

Final Requirements: Under the final requirements, a non-public school is considered to enroll a significant percentage of students from low-income families, as defined in these requirements, if the percentage of students from low-income families enrolled in the school meets or exceeds 40 percent, based on the data source(s) selected by the State under these requirements. Alternatively, a State may propose and, if approved by the Secretary, use an alternate significant poverty percentage based on circumstances in the State, which may be (1) the State's average percentage of students from low-income families in public and non-public schools, (2) the average percentage of students from low-income families in non-public schools in the State that, for example, applied for or participated in the CRRSA EANS program, or (3) other factors that the State demonstrates support an alternate significant poverty percentage.

Reasons: A 40-percent poverty percentage has long been recognized as a measure of significant poverty to operate a schoolwide program under title I of the ESEA. In the context of title I, 40-percent poverty is the statutory

threshold for a title I school to use title I funds to upgrade the entire educational program of a school and serve all students. (See section 1114(a)(1)(A) of the ESEA). Given Congress' recognition of 40 percent as significant within the context of title I, we believe it presents a reasonable threshold with respect to the ARP EANS program as well.

We recognize, however, that there may be circumstances in the State that may warrant establishing a different significant percentage of students from low-income families for non-public schools. As a result, under the final requirements, a State has the option of using an alternate significant poverty percentage upon approval by the Secretary based on factors in the State. To receive approval, a State must provide data and a supporting rationale to justify the use of such alternative as part of its ARP EANS application.

The final requirements permit a State to apply to use an alternate significant poverty percentage based on the State's average percentage of students from low-income families in both public and private schools. This option recognizes that the determination of what constitutes a significant poverty percentage may vary from State to State based on a particular State's relative level of poverty.

The final requirements also allow a State to apply to use an alternate significant poverty percentage based on,

for example, the average percentage of students from low-income families in non-public schools in the State that applied for or participated in the CRRSA EANS program. Using an average percentage of poverty in non-public schools could allow a State to establish an appropriate significant poverty percentage relative to non-public schools in the State.

Finally, the final requirements also permit a State to support an alternate significant poverty percentage based on factors that the State demonstrates reflect significant poverty. For example, a State might submit data showing the relative rates of poverty in non-public schools as compared to public schools, or the percentage of non-public schools that would be excluded at different poverty percentages, and explain why those data support the requested alternate percentage.

We believe these alternatives address some commenters' concerns that a State should have the opportunity to propose a significant poverty percentage that reflects circumstances within the State. We know that poverty percentages vary considerably among States and between public and non-public schools. The alternatives permit a State to propose a significant poverty percentage relative to poverty within the State.

Most Impacted by the COVID-19 Emergency Statute

Under section 2002(a) of the ARP Act, services or assistance to non-public schools under the ARP EANS program is limited to “non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency.”

Final Requirements: Under the final requirements, an SEA determines if a non-public school is most impacted by the COVID-19 emergency based on one or more of the following factors: (1) the number of COVID-19 infections per capita in the community or communities served by the non-public school; (2) the number of COVID-19 deaths per capita in the community or communities served by the non-public school; (3) data on the academic impact of lost instructional time and the social, emotional, or mental health impacts attributable to the disruption of instruction caused by the COVID-19 emergency; or (4) the economic impact of the COVID-19 emergency on the community or communities served by the non-public school. In addition to using one or more of these factors, an SEA may use other factors included in the State’s approved application to determine which non-public schools are most impacted by the COVID-19 emergency.

Reasons: The final requirements afford a State several options from which to choose in assessing impact. COVID-19

infection and death rates are readily available⁴ and provide a reasonable way to identify communities most impacted by the COVID-19 emergency. Additionally, students are facing significant academic challenges as a result of the lost instructional time,⁵ and social, emotional, and mental health impacts attributable to the disruption of instruction caused by the COVID-19 emergency. Depending upon the specific circumstances, these issues may be more pronounced in some non-public schools than others. Finally, the COVID-19 emergency has had a disproportionate economic impact on many communities,⁶ including high rates of unemployment, which may have a concomitant impact on non-public schools serving such communities.

Given the wide-ranging impact of the COVID-19 emergency on schools and communities throughout the Nation, we recognize that there is no single factor with which to assess the impact of the COVID-19 emergency on non-public schools. Thus, in addition to one or more of the above factors, the final requirements allow an SEA to use other factors included in the State's approved application to

⁴ The Centers for Disease Control and Prevention provides a COVID Data Tracker on its website, available at <https://covid.cdc.gov/covid-data-tracker/>, which includes community data on reported COVID-19 cases and deaths.

⁵ We note that section 312(d)(4)(L) of division M of the CRRSA Act specifically authorizes the use of EANS funds to address "learning loss," which the final requirements refer to as the "academic impact of lost instructional time."

⁶ See, e.g., Aaron Klein & Ember Smith, *Explaining the Economic Impact of COVID-19: Core Industries and the Hispanic Workforce*, Brookings Institution (Feb. 5, 2021), <https://www.brookings.edu/research/explaining-the-economic-impact-of-covid-19-core-industries-and-the-hispanic-workforce/>.

determine the non-public schools most impacted by the COVID-19 emergency.

We recognize that non-public schools often draw students from communities other than the one in which they are located. Thus, the factors in the final requirements related to per capita COVID-19 infections and deaths as well as economic impact are relative to the community or communities served by a non-public school, which the SEA has flexibility to determine.

The final requirements reflect many of the comments recommending that the Department use the factors in the EANS FAQs and give States a range of options. Some commenters urged that the impact of the COVID-19 emergency not be allowed to outweigh poverty. The final requirements use a majority of the factors in the EANS FAQs and permit an SEA to add others included in the State's approved application for EANS funding. They also make clear that a non-public school must meet both the State's significant poverty percentage and be most impacted by the COVID-19 emergency, as required by the ARP Act.

Transparency

Statute: Section 312(d)(2)(B)(i) of the CRRSA Act requires an SEA to "distribute information about the [EANS] program to non-public schools and make the information . . . easily available." Under 20 U.S.C. 1221e-3, the Secretary has the

authority to promulgate rules governing the programs administered by the Department.

Final Requirements: Following approval of the Governor's ARP EANS application by the Secretary, an SEA must publish on its website, on or before the date it makes applications for services or assistance available to non-public schools, the State's approved (1) minimum percentage to determine whether a non-public school enrolls a significant percentage of students from low-income families; (2) source(s) of poverty data to be used in determining counts of students from low-income families in a non-public school; and (3) factors to determine whether a non-public school is most impacted by the COVID-19 emergency.

Reasons: We believe transparency regarding the significant poverty percentage, sources of poverty data, and factors for determining schools most impacted by the COVID-19 emergency that a State uses are important given the potential variations among States. Transparency would ensure that all stakeholders are aware of the specific criteria each State plans to apply in determining which non-public schools receive services or assistance under the ARP EANS program.

DETERMINING LOW-INCOME COUNTS

Low-Income Threshold

Statute: Under section 2002(a) of the ARP Act, services or assistance to non-public schools under the ARP EANS program

are limited to “non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency.” Neither the ARP Act nor the CRRSA Act defines “students from low-income families” or “low-income students.”

Final Requirements: To be counted as a student from a low-income family for purposes of these requirements, a student must be aged 5 through 17 from a family whose income does not exceed 185 percent of the 2020 Federal poverty level.

Reasons: The Department defined the count of children as those aged 5 through 17 because that is the age range section 312(d)(1)(B) of division M of the CRRSA Act requires the Department to use to allocate EANS funds to States. Additionally, that age range is used in other contexts involving Federal education funds, including allocating funds to local educational agencies and determining the proportional share for equitable services under title I of the ESEA. (See, for example, sections 1117(c)(1) and 1124(c)(1) of the ESEA). The Department chose to set a limit on the poverty threshold for the family of a student to be counted as low-income at 185 percent of the 2020 Federal poverty level for several reasons. Section 312(d)(1)(B) of division M of the CRRSA Act requires the Department to allocate EANS funds to each State based on the proportion of children aged 5 through 17

"at or below 185 percent of poverty who are enrolled in non-public schools in the State." The threshold to qualify for free and reduced-price meals under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) is 185 percent of the Federal poverty level, and eligibility for free and reduced-price meals also is the poverty measure most often used for determining within-district allocations and for identifying the economically disadvantaged subgroup for accountability and reporting purposes under title I of the ESEA. One hundred eighty-five percent of the Federal poverty level is also the threshold to qualify for the E-rate program administered by the Federal Communications Commission (47 CFR 54.500, 54.505(b)). Finally, several commenters recommended 185 percent of the Federal poverty level as the threshold for family income. For these reasons, the Department believes it is the appropriate standard of low-income status for use in determining what constitutes a significant percentage of students from low-income families in non-public schools in order to provide services or assistance under the ARP EANS program.

Sources of Data on Family Income

Statute: Under section 2002(a) of the ARP Act, services or assistance to non-public schools under the ARP EANS program are limited to "non-public schools that enroll a significant percentage of [students from low-income

families] and are most impacted by the [COVID-19] emergency.” Neither the ARP Act nor the CRRSA Act defines the term “students from low-income families” or “low-income students.”

Final Requirements: Under the final requirements, to obtain a count of students from low-income families enrolled in a non-public school, an SEA may use one or more of the following sources of data, provided the poverty threshold is consistent across sources and does not exceed 185 percent of the 2020 Federal poverty level: (1) free or reduced-price lunch data; (2) data from the E-rate program; (3) data from a different source, such as scholarship or financial assistance data; or (4) data from a survey developed by the SEA.

Reasons: Free and reduced-price lunch data is the source of poverty data most aligned to 185 percent of the 2020 Federal poverty level. The Department recognizes, however, that many non-public schools do not participate in the Federal meals program. E-rate data are similarly aligned but also may not be available for many non-public schools. Accordingly, the Department includes other sources of data for an SEA to choose that should be more readily available to non-public schools. An SEA may also send a survey to non-public school families to collect poverty data for use in meeting the SEA’s threshold for significant percentage of students from low-income families, provided the SEA has

sufficient time to distribute, collect, and compile data from the surveys.

The final requirements afford an SEA some latitude to select one or more sources of poverty data, provided the poverty threshold is consistent among sources and does not exceed 185 percent of the Federal poverty level. Such latitude was particularly requested by commenters representing the non-public school community, given that not every school has the same poverty data on its families. The Department encourages an SEA to consult with non-public school officials regarding available sources of poverty data. Additionally, given that not all non-public schools have access to the same poverty data, the Department encourages an SEA to permit multiple sources of data, among schools or within a school, provided those data use a consistent poverty threshold.

FINAL REQUIREMENTS

The Secretary establishes the following final requirements for the ARP EANS program:

(a) In general. A State educational agency (SEA) must provide services or assistance under the Emergency Assistance to Non-Public Schools (EANS) program, as authorized by the American Rescue Plan Act of 2021 (ARP Act), in accordance with the requirements applicable to the EANS program under section 312(d) of division M of the

Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act), except that--

(1) An SEA may provide such services or assistance only to an eligible non-public school that enrolls a significant percentage of students from low-income families and is most impacted by the COVID-19 emergency; and

(2) An SEA may not use such funds to provide reimbursements to any non-public school.

(b) Determining non-public schools to be served.

(1) To provide services or assistance to a non-public school under paragraph (a), an SEA must determine, consistent with the State's approved application for EANS funding under the ARP Act, that the school--

(i) Enrolls a significant percentage of students from low-income families in accordance with paragraphs (b)(2) and (c) of this section; and

(ii) Is most impacted by the COVID-19 emergency in accordance with paragraph (b)(3) of this section.

(2) A non-public school enrolls a significant percentage of students from low-income families if the percentage of students from low-income families enrolled in such school meets or exceeds--

(i) 40 percent; or

(ii) An alternate significant percentage approved by the Secretary in the State's application for EANS funding

under the ARP Act that is based on circumstances in the State, which may be--

(A) The State's average percentage of students from low-income families in public and non-public schools;

(B) The average percentage of students from low-income families in non-public schools in the State that, for example, applied for or participated in the EANS program as authorized by the CRRSA Act; or

(C) Other factors that the State demonstrates support an alternate significant poverty percentage.

(3)(i) A non-public school is most impacted by the COVID-19 emergency based on one or more of the following factors--

(A) The number of COVID-19 infections per capita in the community or communities served by the non-public school;

(B) The number of COVID-19-related deaths per capita in the community or communities served by the non-public school;

(C) Data on the academic impact of lost instructional time and the social, emotional, and mental health impacts on students attending the non-public school attributable to the disruption of instruction caused by the COVID-19 emergency; or

(D) The economic impact of the COVID-19 emergency on the community or communities served by the non-public school.

(ii) In addition to using one or more of the factors identified in paragraph (b)(3)(i), an SEA may use other factors included in the State's approved application for EANS funding under the ARP Act to determine that a non-public school is most impacted by the COVID-19 emergency.

(4) An SEA must publish on its website, on or before the date it makes applications for EANS services or assistance under the ARP Act available to non-public schools, the State's approved--

(i) Minimum percentage to determine whether a non-public school enrolls a significant percentage of students from low-income families;

(ii) The source(s) of poverty data the State will use to determine counts of students from low-income families in a non-public school; and

(iii) Factors to determine whether a non-public school is most impacted by the COVID-19 emergency.

(c) Determining low-income counts. (1) To be counted as a student from a low-income family for purposes of this section, a student must be aged 5 through 17 from a family whose income does not exceed 185 percent of the 2020 Federal poverty level.

(2) To obtain a count of students from low-income families enrolled in a non-public school under paragraph (c)(1), an SEA may use one or more of the following sources of data, provided the poverty threshold is consistent across sources--

(i) Data on student eligibility for free or reduced-price lunch under the Richard B. Russell National School Lunch Act (43 U.S.C. 1751 et seq.);

(ii) Data from the E-rate program administered by the Federal Communications Commission (47 CFR 54.500, 54.505(b));

(iii) Data from a different source, such as scholarship or financial assistance data; or

(iv) Data from a survey developed by the SEA.

Waiver of Notice and Comment Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 551-559), the Department generally offers interested parties notice of and the opportunity to comment on proposed requirements. However, the APA provides that an agency is not required to conduct notice and comment rulemaking "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." (5 U.S.C. 553(b)(B)).

Here, there is good cause for waiving notice and comment rulemaking. Notice and comment rulemaking would be impracticable because the time involved would preclude emergency funds being available to meet exigent needs of non-public schools resulting from the COVID-19 emergency, including the provision of services to address the academic impact of lost instructional time among non-public school students. The COVID-19 emergency continues to present extraordinary circumstances, including widespread school closures, significant loss of instructional time, and trauma for students, educators, and other staff.

The final requirements provide reasonable parameters to address ambiguities regarding how to provide services or assistance to eligible non-public schools that enroll a significant percentage of students from low-income families and are most impacted by the COVID-19 emergency. Accordingly, the final requirements are critical to ensuring that SEAs effectively and timely implement the ARP EANS program. In addition, the Department believes it is important to make clear the continued applicability of EANS requirements under the CRRSA Act, except as otherwise provided in the ARP Act. However, going through the full rulemaking process would delay the ability of SEAs to provide services or assistance to eligible non-public schools using ARP EANS funds, which are emergency funds intended to meet the immediate needs of non-public schools,

including their students and teachers. Establishing these final requirements now, without the delay of notice and comment rulemaking, enables SEAs to effectively use ARP EANS funds to provide services or assistance to non-public schools to address the immediate safety and academic needs of students and help such schools safely return to or continue in-person instruction.

The Department has moved with urgency to publish this document in an expedited fashion to ensure timely availability of funds to non-public schools. The ARP Act was signed into law on March 11, 2021. Just one month later, on April 12, 2021, the Department published a request for information from the public to obtain comments that were due on April 26, 2021. After reviewing and considering the 66 comments received, the Department is publishing this document about two months after the comments were received.

Additionally, as noted above, the Department invited comment regarding implementation of the requirement "to provide services or assistance to non-public schools that enroll a significant percentage of [students from low-income families] and are most impacted by the [COVID-19] emergency" as part of the *Notice Inviting Applications and Announcing Allocations for the Emergency Assistance to Non-Public Schools Program Under the American Rescue Plan Act of 2021*, issued on April 12, 2021. The Department reviewed

and considered the comments received in response to that notice in the development of these final requirements. That prior comment process and the Department's responsiveness to those comments mitigate the need for notice-and-comment rulemaking in this context.

The APA also requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner. (5 U.S.C. 553(d)(3)). Again, because the ARP EANS funds are needed to address the immediate needs of students, educators, and schools due to the COVID-19 emergency, the Secretary also has good cause to waive the 30-day delay in the effective date of these requirements under 5 U.S.C. 553(d)(3).

Under the Congressional Review Act (CRA), a major rule may take effect no sooner than 60 calendar days after an agency submits a CRA report to Congress or the rule is published in the *Federal Register*, whichever is later. (5 U.S.C. 801(a)(3)(A)). However, the CRA creates limited exceptions to this requirement. (See 5 U.S.C. 801(c), 808). Section 808(2) provides that "any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal

agency promulgating the rule determines.” As stated above, the Department has found good cause to issue these final requirements without notice-and-comment rulemaking, and thus we are not including the 60-day delayed effective date in this document.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities, in a material way (also referred to as “economically significant” regulations);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This regulatory action is an economically significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OMB's Office of Information and Regulatory Affairs designated this rule as a "major rule," as defined by 5 U.S.C. 804(2).

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;

(3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health

and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including providing economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or providing information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

The Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and we are issuing these final requirements only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows and the reasons stated elsewhere in

this document, the Department believes that the final requirements are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In this regulatory impact analysis, we discuss the need for regulatory action, the potential costs and benefits, and net budget impacts.

Elsewhere, under Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

Need for Regulatory Action

These final requirements are intended to clarify the provision of services or assistance to eligible non-public schools under the ARP EANS program. As discussed elsewhere in this document, the ARP EANS program provides significant resources to SEAs through each respective Governor to provide such services or assistance to respond to the unprecedented educational disruptions caused by the COVID-19 emergency. The Department believes this regulatory action is needed to ensure that SEAs provide services or assistance to non-public schools in a manner consistent with statutory requirements. In particular, the Department believes it is important to clarify the continued

applicability of EANS requirements under the CRRSA Act, except as otherwise provided in the ARP Act. Additionally, the Department believes clarification is needed to ensure that SEAs implement with fidelity the requirement to provide services or assistance only to eligible non-public schools that enroll a significant percentage of students from low-income families and are most impacted by the COVID-19 emergency.

Analysis of Costs and Benefits

The Department believes this regulatory action does not impose significant new cost-bearing requirements on SEAs or other entities. This action primarily serves to clarify or give specific meaning to statutory requirements for SEAs in determining eligible non-public schools for services or assistance under the ARP EANS program; it generally does not establish new substantive requirements. Accordingly, costs associated with this action are attributable generally to the program statute. Moreover, in promulgating these final requirements, we have sought where possible to minimize the burden on SEAs in applying for ARP EANS funds and in complying with the statute. Any costs associated with the final requirements that are not directly attributable to the statute are outweighed by their benefits which, in addition to reduced burden, include clarity, appropriate flexibility, and transparency in SEA administration of the program.

Under the ARP EANS program, SEAs provide services or assistance to eligible non-public schools that enroll a significant percentage of students from low-income families and are most impacted by the COVID-19 emergency. The final requirements establish that a non-public school enrolls a significant percentage of students from low-income families if the percentage of those students enrolled in the school meets or exceeds 40 percent or an alternate significant percentage approved by the Secretary that is based on circumstances in the State. As discussed elsewhere in this document, 40 percent has long been recognized as a measure of significant poverty under title I of the ESEA. In addition to providing clarity, by using this percentage to determine whether a non-public school enrolls a significant percentage of students from low-income families, the final requirements employ a standard that is familiar to SEAs, thereby minimizing burden. By allowing an SEA to use an alternate significant percentage approved by the Secretary, the final requirements also provide appropriate flexibility to SEAs if circumstances in the State warrant a percentage other than 40 percent.

The final requirements also establish that a student is included in the count of students from low-income families enrolled in a non-public school if the student is aged 5 through 17 and from a family whose income does not exceed 185 percent of the 2020 Federal poverty level. This

commonly used poverty threshold similarly minimizes the burden on SEAs in complying with the program statute while also providing clarity in program administration.

The final requirements further establish that, in determining which non-public schools are most impacted by the COVID-19 emergency, an SEA must use at least one of four identified factors, which notably include the numbers of COVID-19 infections and COVID-19-related deaths in communities served by the school. As discussed elsewhere in this document, community COVID-19 infection and death rates are readily available. Accordingly, the final requirements would allow an SEA to meet statutory requirements with minimal burden.

Lastly, the final requirements establish a new substantive requirement on SEAs, namely, to provide transparency in program administration by publishing on the SEA website the minimum percentage used to determine whether a non-public school enrolls a significant percentage of students from low-income families, source(s) of poverty data, and the factors to be used to determine whether a school is most impacted by the COVID-19 emergency. We estimate that each SEA will need two hours to comply with this website posting requirement. At \$97.28 per hour (using mean wages for Education and Childcare Administrators⁷ and assuming the total cost of labor,

⁷ See https://www.bls.gov/oes/current/oes_nat.htm.

including benefits and overhead, is equal to 200 percent of the mean wage rate), the total estimated cost for 52 SEAs (including the District of Columbia and the Commonwealth of Puerto Rico) is approximately \$10,100.

Separately, the ARP EANS application imposes costs on SEAs. We estimate that each SEA will need two hours to complete the ARP EANS application. At \$97.28 per hour, the total estimated cost for 52 SEAs to complete the ARP EANS application is approximately \$10,100.

Net Budget Impacts

We estimate that the discretionary elements of these final requirements will not have an impact on the Federal budget. This regulatory action establishes requirements for SEAs receiving ARP EANS funds but does not affect the amount of funding available for this program. We anticipate that the \$2.75 billion in ARP EANS funds will be disbursed in Fiscal Year 2021, and therefore estimate \$2.75 billion in transfers in Fiscal Year 2021 relative to the pre-statutory baseline.

Accounting Statement

Accounting Statement: Classification of Estimated Impacts
[in millions]

Category	Benefits
Clarity, flexibility, and transparency in SEA administration of ARP EANS program	Not quantified
	Costs
Application completion and publication by SEAs of the minimum percentage used to determine whether a non-public school enrolls a significant percentage of students from low-income families, source(s) of poverty data, and the factors used to determine whether a school is most impacted by COVID-19	\$0.02
	Transfers
Services and assistance to non-public schools that enroll a significant percentage of students from low-income families and are most impacted by the COVID-19 emergency	\$2,750

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice-and-comment rulemaking under the APA (5 U.S.C. 553).

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment

on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.). This helps ensure that the public understands the Department's collection instructions, respondents provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of the law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

As discussed in the Analysis of Costs and Benefits section of the Regulatory Impact Analysis, the Department believes this regulatory action does not impose significant new cost-bearing requirements on SEAs or other entities and that it primarily serves to clarify or give specific meaning to statutory requirements for SEAs. The final requirements for determining non-public schools to be served and determining low-income counts allow SEAs to use

generally available data and employ standards SEAs are familiar with, thereby minimizing cost and burden. The requirement that SEAs provide transparency in program administration, however, by publishing on their website the minimum percentage used to determine whether a non-public school enrolls a significant percentage of students from low-income families, the source(s) of poverty data, and the factors to be used to determine whether a school is most impacted by the COVID-19 emergency imposes a cost and burden hours on SEAs. In addition, the ARP EANS application will impose a cost and burden hours on SEAs. Those costs and burdens are discussed below.

For the final requirement to provide transparency in program administration by publishing on the SEA website the minimum percentage used to determine whether a non-public school enrolls a significant percentage of students from low-income families and the factors to be used to determine whether a school is most impacted by the COVID-19 emergency, we estimate that each SEA will need two hours to comply with the website posting requirement. At \$97.28 per hour, the total estimated cost for 52 SEAs (including the District of Columbia and the Commonwealth of Puerto Rico) is approximately \$10,100, and the total estimated burden is 104 hours.

We estimate that one application will be prepared by each eligible SEA and submitted through the Governor of the

respective State. For the time to complete the application, we estimate that the number of burden hours per response will be two hours. The total estimated number of burden hours is 104 hours. At \$97.28 per hour, the total estimated cost for 52 SEAs to complete the ARP EANS application (including the District of Columbia and the Commonwealth of Puerto Rico) is also approximately \$10,100.

Collectively, we estimate that these new information collection activities will result in a total estimated cost of \$20,200 and a total estimated burden of 208 hours to the public annually. The Department is requesting an emergency paperwork clearance from OMB under 5 CFR 1320.13 on the OMB 1810-0741 data collection associated with these final requirements. That request will account for all burden hours and costs discussed within this section.

Consistent with 5 CFR 1320.8(d), the Department is also soliciting comments on the information collection. We must receive your comments on the collection activities contained in these final requirements on or before [INSERT DATE 60 DAYS FROM THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Comments related to the information collection activities must be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov by selecting the Docket ID number ED-2021-SCC-0101 or via postal mail, commercial delivery, or hand delivery by

referencing the Docket ID number and the title of the information collection request at the top of your comment. Comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave., SW, LBJ, Room 6W208D, Washington, DC 20202-8240.

Note: The Office of Information and Regulatory Affairs and the Department review all comments related to the information collection activities posted at www.regulations.gov.

Collection of Information

Information Collection Activity	Estimated Number Responses	Hours Per Response	Total Estimated Burden Hours	Estimated Cost at an Hourly Rate of \$97.28
SEA Transparency	52	2	104	\$10,100
SEA ARP EANS Application	52	2	104	\$10,100
Annualized Total	104	4	208	\$20,200

Intergovernmental Review

The ARP EANS program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich

Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, compact disc, or other accessible format.

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Ian Rosenblum,
*Deputy Assistant Secretary for
Policy and Programs delegated the
authority to perform the functions
and duties of the Assistant
Secretary, Office of Elementary
and Secondary Education.*